



25 January 2011

The Aboriginal Affairs and Reconciliation Division
Department of the Premier and Cabinet
GPO Box 2343
ADELAIDE SA 5001

Dear Sir/Madam

Re: Review of the *Aboriginal Lands Trust Act 1966* – Consultation Paper

I provide the following comments in relation to the consultation paper released by the Hon Grace Portolesi MP on 4 November 2010 on the review of the *Aboriginal Lands Trust Act 1966* ('the ALT Act'). Staff from my office or I am available to discuss my comments in more detail, if required.

The role and function of the Registrar

The Registrar is an independent statutory office holder who administers the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* ('the CATSI Act'). The Office of the Registrar of Indigenous Corporations ('ORIC') provides support to the Registrar in administering the CATSI Act.

The Registrar regulates approximately 2,250 Aboriginal and Torres Strait Islander corporations, ranging in size, function and location. Approximately 58 per cent of the corporations incorporated under the CATSI Act operate in remote parts of Australia.

The main functions of the Registrar include:

- administering the CATSI Act
- registering new groups as corporations under the CATSI Act
- regulating and monitoring the legislative compliance of corporations registered under the CATSI Act, and
- providing a range of corporate governance support to Aboriginal and Torres Strait Islander corporations.

Comments on parts of the consultation paper

The ALT consultation paper acknowledges that the ALT will support changes to meet the environmental, economic, social, and cultural challenges of Aboriginal land ownership and management.

The Registrar recognises that a major component of ensuring the ability of Aboriginal people to meet these challenges is the development of sound governance practices, within an appropriate framework.

Dispute resolution

Section 3.3 of the consultation paper makes reference to a proposed dispute resolution process to resolve disputes arising from ownership, contractual arrangements, and the use of ALT land. The paper acknowledges that in many instances the ALT board and Minister are brought into disputes where they may be perceived by the parties as not 'independent' in the dispute resolution process.

In this respect, the discussion paper makes reference to the dispute resolution processes available to corporations incorporated under the CATSI Act. As you know, all corporations registered under the CATSI Act are required to have an internal dispute resolution process in their constitution. The Registrar also offers a free mediation and dispute resolution service when a corporation's internal dispute resolution process is unable to resolve a dispute. The Registrar's staff work with the parties to achieve a lasting resolution of the dispute.

ORIC's April 2010 report, *Analysing key characteristics in Indigenous corporate failure*¹, found that 15% of all Aboriginal and Torres Strait Islander corporations (registered under the CATSI Act) that failed between 1996 and 2008, did so because of internal disputes—the third most common cause of failure. Effective and simple internal and external dispute resolution processes are an important part of any public or community organisation's governance framework and can prevent corporate failure or expensive legal proceedings. For this reason we have invested heavily in mediation and dispute resolution processes and services in the last two years.

I would support the proposal in the consultation paper to establish internal dispute resolution processes (provided for in constitutions and/or contractual provisions) and an external dispute resolution process for Aboriginal community members, community organisations, other lessees and the ALT. For corporations registered under the CATSI Act, the Registrar's mediation and dispute resolution services could complement these services.

I make no comment on whether or not the Environment Resources and Development Court is the appropriate external body to resolve disputes relating to ALT land.

Governance

Section 3.4.1 of the consultation paper discusses the importance of ensuring appropriate governance within organisations holding interests in community land. The question asked is, *Should the ALT be able to set policies for governance of organisations that hold an interest in ALT community land?*

¹ A copy can be downloaded from www.oric.gov.au in the publications section.

I note the comment on page 21 that it would not be feasible or appropriate for the ALT to duplicate the role of corporate regulators. While a matter entirely for the South Australian Government I would submit that if the ALT were to develop and publish *mandatory* governance policies for organisations holding an interest in ALT land that it may need to take on a more intensive supervisory and regulatory role. In setting policies that an organisation '*will need to comply*' with implies that the ALT will need to monitor compliance and take regulatory action if an organisation does not comply.

Rather than creating new or expanded governance requirements solely for organisations with an interest in ALT land that are very prescriptive it would be more effective to require registration or incorporation under an existing scheme. There are already schemes that prescribe high standards of governance, have strong and effective regulators and provide extensive remedies to creditors and members to protect their interests. Through a principles based approach rather than prescription these existing schemes provide a framework for high standards of governance that is desired by stakeholders in organisations with an interest in ALT land.

I would submit that mandating registration under the *Corporations Act 2001* or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* would be a more appropriate mechanism for improving the accountability and governance of organisations with an interest in ALT land.

On page 21 of the discussion paper it is suggested that the ALT may be required to develop specific and mandatory governance policies for organisation with an interest in ALT land. The majority of the matters referred to on page 21 would be part of the good governance of any organisation registered under the *Corporations Act 2001* or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. The policies could be developed by the ALT as guides rather than mandated thereby negating the need for the ALT to take on a regulatory or enforcement role.

What is required to ensure good governance at an organisation will depend on the circumstances of the organisation and the experience and capacity of the people involved with the organisation. A principles based approach to governance provides flexibility to address the particular governance needs of an organisation. Prescription is generally not as effective.

Whether principles based or prescriptive, no scheme can guarantee that an organisation will not at some stage experience poor governance. In these instances it is important to have an effective regulator and extensive remedies available to members and creditors to protect their interests. The *Corporations Act 2001* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* provide for this.

As well as its regulatory role the Registrar also provides a range of services, such as free corporate governance training, to build the capacity of Aboriginal and Torres Strait Islander organisations. I would submit that it would be appropriate for Aboriginal organisations with an interest in ALT land to be registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

There are existing examples of mandating registration under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. Prescribed bodies corporate under the

Native Title Act 1993, stores under the *Northern Territory National Emergency Response Act 2007* and royalty associations under the *Aboriginal Land Rights (Northern Territory) Act 1976* must, under the provisions of the applicable legislation, be registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

In addition the Queensland Government has drafted an amendment to the *Aboriginal Land Act 1991* which requires grantees of trust lands from the Queensland Minister to be 'a CATSI corporation that is qualified to hold the land', a land trust or the Aurukun or Mornington shire councils².

Transfer of residential land

Section 4.5 of the consultation paper addresses the requirements for the transfer of residential land and notes that the transfer would only occur where communities can comply with corporate governance policies, and the processes relating to decision making have been followed.

My comments above in relation to Section 3.4.1 are relevant here and I would recommend that residential community organisations holding the title to community land should be registered under the CATSI Act. A large number of existing Aboriginal and Torres Strait Islander housing providers are registered under the CATSI Act.

Deregistration exemption under the CATSI Act

Another benefit of registering Aboriginal organisations holding an interest in ALT land under the CATSI Act relates to deregistration. When a corporation is deregistered the assets of a corporation vest in the Registrar [subsection 546-20(2)].

Subsection 546-45(1) of the Act enables regulations to be made that modify or limit the deregistration and vesting provisions of the Act in relation to corporations that hold land for the benefit of Aboriginal people or Torres Strait Islanders. A specific power to make regulations already applies in relation to the *Aboriginal Land Act 1991* of Queensland [subsection 546-45(1)(a)] and an exemption is in effect for registered native title bodies corporate under the *Native Title Act 1993* (section 546-15 of the CATSI Act).

In effect this means that regulations could be made, on the advice of the Minister for Families, Housing, Community Services and Indigenous Affairs to the Governor-General, under the CATSI Act vesting the land of a deregistered corporation holding an interest in former or current ALT land in the ALT rather than the Registrar. Similar provisions do not apply under the *Associations Incorporation Act 1985* (SA) or the *Corporations Act 2001*. Such regulations would complement the statutory caveat proposed in Section 4.6 of the consultation paper.

The CATSI Act

The CATSI Act came into force on 1 July 2007 and is Commonwealth legislation. The Act is administered by the Registrar of Indigenous Corporations. The CATSI Act replaced the *Aboriginal Councils and Associations Act 1976*.

² Clause 30 – Aboriginal Land and Torres Strait Islander Land and Other Legislation Amendment Bill 2010 – new section 28(2)(a), Part 2 amendment of the Aboriginal Land Act

The CATSI Act is a special measure for the advancement and protection of Aboriginal and Torres Strait Islander people. It is designed to accommodate the specific cultural practices and local circumstances of Aboriginal and Torres Strait Islander groups, and reflect their particular needs in a corporate structure.

Accountability and transparency

The CATSI Act provides a mechanism to ensure that corporations have strong accountability and transparency processes. All corporations are required to submit general reports to the Registrar, with medium and large corporations required to provide audited financial statements that have been provided to all members.

For the 2008-09 financial year 92 per cent of corporations registered under the CATSI Act complied with their statutory reporting obligations. This is expected to be exceeded for the 2009-10 financial year. This meets international best practice and would far exceed the reporting compliance of associations registered under the *Associations Incorporation Act 1985* (SA).

All corporations are required to hold an annual general meeting of members each year.

Members have the right to inspect the corporation's books and intervene in proceedings (e.g. under s. 163-1 of the CATSI Act). In addition, officers of corporations are liable to prosecution and disqualification under certain circumstances.

In addition members have the statutory right to request that directors call meetings of members to raise and discuss issues of importance to them.

These processes ensure transparency in the management of the corporation for regulatory bodies, key stakeholders and the corporation's membership.

Flexibility

The CATSI Act provides a very flexible incorporation structure for Aboriginal and Torres Strait Islander people. For profit and not-for-profit businesses or organisations can be incorporated under the CATSI Act, unlike the *Associations Incorporation Act 1985* (SA). The CATSI Act also provides national registration and registration is not limited to one state or territory.

The CATSI Act also allows members to amend their corporation's constitution in response to changing circumstances. Aboriginal and Torres Strait Islander people can incorporate traditional or family governance mechanisms into their corporation's constitution. The Registrar provides free assistance to corporations in the drafting of any changes to their constitutions.

Advice, information and support

Aboriginal and Torres Strait Islander people or groups can receive free advice, information and support from the Registrar in relation to registering a corporation under the CATSI Act, and post registration in relation to the operation of their corporation.

The Registrar currently has one staff member located in the Anangu Pitjantjatjara Yankunytjatjara lands in South Australia that works directly with community organisations.

The Registrar has developed a rule book (constitution) information kit to help Aboriginal and Torres Strait Islander people develop an appropriate set of rules when they set up an Aboriginal or Torres Strait Islander corporation. The information kit provides information about important matters that groups need to consider when setting up a corporation, how to tailor their rules to suit their particular circumstances and what groups might want to include in their rules.

The Registrar also provides a pro-bono legal service, LawHelp which provides Aboriginal and Torres Strait Islander corporations registered under the CATSI Act with access to free legal assistance from some of Australia's largest legal firms. A range of services can be provided under the program including:

- interpreting the law
- contract drafting, negotiation and management
- assistance on employment issues such as contracts and workers compensation law
- basic tax issues such as registering for an ABN and for GST, FBT and PAYG withholding
- how to apply with laws applying to the corporation, including identifying and managing legal risks
- consumer protection and trade practices issues
- intellectual property arrangements, and
- property matters.

Corporations registered under the CATSI Act can also access from the Registrar free assistance to recruit staff and independent directors. Corporations can advertise their vacant positions free of charge on the Registrar's website and access free template selection criteria, recruitment guides and employment contracts. From February 2011 the Registrar will also provide direct assistance and advice to corporations in recruiting senior staff.

Corporate governance training

The Registrar delivers free tailored corporate governance training to Aboriginal and Torres Strait Islander corporations including:

- Non-accredited governance workshops tailored to regional and remote audiences
- Corporation specific training
- Nationally accredited Certificate IV in Business (Governance) and Diploma of Business (Governance).

Specific issues covered by the training include the legal status of a corporation, directors' roles and responsibilities, using your constitution, financial management and budgets, strategic and business planning, assets management, reporting requirements, securing funds and creating enterprise opportunities.

The Registrar currently provides a range of training programs in South Australia through a memorandum of understanding established with the Aboriginal Affairs and Reconciliation Division of the South Australian Department of the Premier and Cabinet. This was first established in 2006.

Dispute resolution and mediation

As referred to above, the Registrar provides dispute resolution and mediation services to corporations, with a focus on achieving a resolution most suited to the corporation's needs. This service is provided at no cost to the corporation.

Examinations

Under section 453-1 of the CATSI Act the Registrar can conduct an examination of the financial position and governance standards of an Aboriginal or Torres Strait Islander corporation. The Registrar conducts approximately 70 – 80 examinations in each year. The examinations are undertaken by the Registrar's staff, but predominately by independent external experts.

Appointment of special administrators

The Registrar has the power under section 487-1 of the CATSI Act to place a corporation under special administration and appoint a special administrator when sufficient grounds have been established.

Part of the work undertaken during a special administration is to build the corporate governance capacity of the corporation, which in turn promotes the long term sustainability of the corporation. The power to appoint a special administrator is exercised when the statutory grounds have been established.

Conclusion

I am pleased to have a strong relationship with South Australian Aboriginal communities and the South Australian Government through the MOU which supports the delivery of training, and our ongoing commitment to achieving improved governance outcomes for Aboriginal people. I hope that as an extension of this, you will consider the proposal to have Aboriginal corporate entities registered with the CATSI Act as part of the ALT Act review.

Thank you for the opportunity to provide you with comments on the review of the *Aboriginal Lands Trust Act 1966*. If you have any questions about my submission please contact Mr Brendan Moyle on 02 6219 7600 or at brendan.moyle@oric.gov.au.

Yours faithfully



Anthony Beven
Registrar